

FILED
JUN 12 2008
By PATRICK E. DUFFY, CLERK
DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

GENE A. AUSTAD,)	CV 08-32-H-DWM-JCL
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
BRIAN SCHWEITZER, GOVERNOR; MIKE)	
FERRITER, DIRECTOR OF THE MONTANA)	
DEPARTMENT OF CORRECTIONS; and)	
MIKE MAHONEY, WARDEN OF MONTANA)	
STATE PRISON,)	
)	
Defendants.)	
)	

Plaintiff Austad has filed a Complaint under 42 U.S.C. § 1983 alleging violations of his constitutional rights and violations of the Americans with Disabilities Act. Austad, a state prisoner confined to a wheelchair, alleges in his § 1983 claims that he was denied medical and dental care, denied access to the courts, and denied due process in a medical parole hearing.

United States Magistrate Judge Carolyn S. Ostby conducted preliminary screening of the Complaint as required by 28 U.S.C. § 1915(e)(2). Under that statute, the court engages in a preliminary screening to assess the merits of the claims and identify cognizable claims, or dismiss the complaint or any portion thereof if the complaint is frivolous, malicious, or fails to state a claim upon which relief can be granted.

Judge Ostby issued Findings and Recommendations in which she recommends that the § 1983 claims be dismissed for failure to name a proper defendant.¹ She explained that despite receiving instructions from the Court to cure the deficiencies in the Complaint, the Plaintiff has consistently failed through four amended complaints to name a defendant whose personal conduct is alleged to have violated his constitutional rights. Plaintiff names only supervising officers, who may be held liable under § 1983 only if they play an affirmative part in the alleged violation of constitutional rights. King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987).

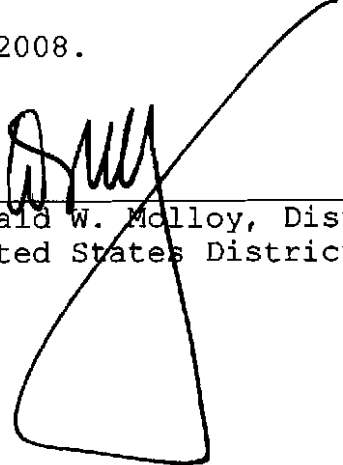
Plaintiff Austad timely objected, thereby preserving his right to de novo review of the record. 28 U.S.C. § 636(b)(1). In his objections Austad alleges that he suffers from amnesia and has a deformed left foot. He also suggests that the court file in this case should be sealed. The objections do not raise a legal challenge to Judge Ostby's recommendations.

¹Judge Ostby order the claims under the Americans with Disabilities Act to be served.

Upon de novo review, I agree with Judge Ostby's Findings and Recommendations and therefore adopt them in full.

Accordingly, IT IS HEREBY ORDERED that Plaintiff Austad's Section 1983 claims are DISMISSED for failure to state a claim upon which relief may be granted.

DATED this 12th day of June, 2008.



Donald W. Molloy, District Judge
United States District Court